United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7256

To be argued by
HOWARD M. SQUADRON

United States Court of Appeals
FOR THE SECOND CIRCUIT

B P/S

MHG ENTERPRISES, INC., JAY PLAYLAND CORP., I. G. AMUSEMENT CORP., G & G RIDE CORP., J.M.P. ENTERPRISE, INC., RON LAMBARDI & GLEN PERRY d/b/a EASTERN AMUSEMENT, THE GREAT ADVENTURE AMUSEMENT PARK, INC., ONASSIS AMUSEMENTS, INC., MICHAEL ESPOSITO d/b/a AMERICAN ZOO, LOUIS ROMANO d/b/a PONY WHEEL, E. B. ANDERSON d/b/a ANDERSON AMUSEMENTS, APPOLLO AMUSEMENTS, INC., R.M.J. AMUSEMENTS, INC., K & J AMUSEMENTS, INC., RENNEBECK AMUSEMENT SERVICE CO., LTD.,

Plaintiffs-Appellants,

v.

NEW YORK CITY PUBLIC DEVELOPMENT CORPORATION, THE CITY OF NEW YORK, and THE SHERIFF OF THE CITY OF NEW YORK,

Defendants-Appellees.

BRIEF OF APPELLANT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

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Plaintiffs-Appellants,

v.

New York City Public Development Corporation, The City of New York, and The Sheriff of the City of New York,

Defendants-Appellees.

BRIEF OF APPELLANT

Issues Presented

1. Where the officers of a not-for-profit corporate agent of a municipality conspire with officers of departments of the municipality to obtain possession of millions of dollars worth of amusement rides and other property located on realty condemned by the municipality without paying compensation for such rides and other property, and where the acts comprising such conspiracy occurred after determina-

tion by the state courts of a related but different claim, is an action for relief from the subsequent conspiracy barred by the prior state determination of the right to possession of the realty?

Statement of the Case

Preliminary

This is an appeal from an order and judgment of Judge Mark A. Costantino of the United States District Court for the Eastern District of New York, vacating a temporary restraining order and dismissing the amended complaint.

Appellants (hereinafter collectively referred to as "MHG"), owners of amusement rides located in an amusement park in Flushing, New York, commenced this action on April 30, 1976. They sought preliminary and permanent relief against a taking by the City of New York ("the City") and the New York City Public Development Corporation ("PDC") without just compensation of property belonging to MHG located on premises theretofore condemned by the City through exercise of the City's power of eminent domain (A3*).

MHG asserted that the District Court had jurisdiction on the basis of 28 USC 1331 and, as against PDC, on the basis of 42 USC 1983 and 28 USC 1343 (A5, 8).

MHG moved for a preliminary injunction and the City and PDC cross-moved to dismiss. Since both sides submitted extensive affidavits and exhibits, the motion must be considered as one for summary judgment under Rule 56 *Fed. R. Civ. P.* See Rules 12(b) and 12(c) *Fed. R. Civ. P.*

The Facts

On this appeal from the dismissal of MHG's complaint on motion on the grounds of *res judicata* (A194), the allega-

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* References are to the Appendix submitted herewith.

tions of the amended complaint and MHG's affidavits must be read in a light most favorable to the party opposing summary judgment. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 82 S. Ct. 993, 8 L.Ed. 2d 176 (1962); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S. Ct. 486, 7 L.Ed. 2d 458 (1962).

These allegations demonstrate a well developed conspiracy to deprive MHG of the use and enjoyment of millions of dollars worth of amusement rides and other property without one cent of compensation or due process of law.

The condemned premises had been used for many years as an amusement park by MHG as tenant of a private landowner as to one portion of the premises and of the City as to another portion (A13). MHG had installed and operated on the property millions of dollars of amusement rides and other property which it contended were affixed to the realty (A14).

On September 18, 1974, the City moved the Supreme Court for an order of possession of the condemned premises. Several months after joining issue on the question of the City's need for possession, but before determination thereof, the parties stipulated that the City might have possession, upon the understanding that the transfer of possession would be preceded by an award of compensation for all fixtures and other compensable property (A14).

On November 19, 1975, the Supreme Court, Queens County, determined that the amusement rides on that portion of the realty leased from the City belonged to MHG. No decree has been entered on that decision (A46). No hearings as to ownership or compensability of the rides or other property located on the privately owned land or as to the value of the land itself have yet commenced (A14).

On October 7, 1975, the Supreme Court granted the City possession of the realty. On November 19, 1975, the Supreme Court declined to alter that decision (A62). The

Appellate Division stayed the Order of Possession pending an appeal to that Court (A63, 15). The appeal was decided adversely to MHG on February 23, 1976. MHG moved for a stay in the New York Court of Appeals (A15). Pending a hearing on the stay motion, the parties agreed to preserve the status quo (A7, 18).

At that moment, after completion of the State court proceedings, the City and PDC began their campaign to compel MHG to forfeit the amusement rides.

On April 8, 1976, despite the agreement not to disturb the status quo, the President of PDC knowingly made false complaints to the Health and Buildings Department about the safety of the amusement rides. All the rides were immediately reinspected and found to be safe (A18, 166).

On April 21, 1976, the Department of Relocation, acting at PDC's request, denied statutorily mandated relocation assistance to MHG on the pretext that relocation assistance to the City's tenants was unauthorized, although such agency had always paid such assistance to other identically situated tenants including some in the same renewal project (A15, 17, 172, 175-176).

On April 27, 1976, the City's Commissioner of Real Estate, at PDC's behest, directed the Department of Buildings to refuse to renew MHG's assembly permit (A165, 169).

Then, four days after this action was commenced in the District Court and MHG had been restored to possession of their property by the District Court's temporary restraining order, the Department of Real Estate falsely complained of allegedly improper practices and baselessly threatened MHG with eviction (A166, 171).

The campaign continued through proceedings here. Thus, the City, after wrongfully refusing relocation assistance, directed MHG to move *all* the rides—even those not yet determined to belong to MHG—within thirty days

or have them deemed abandoned (see Appendix A hereto, the original of which was accepted by the Court on oral argument of MHG's motion for a stay pending appeal).

These acts, coming as they did *after* final determination of the State court proceedings, comprise a new and separate claim not barred by the doctrine of *res judicata*.

Summary of Argument

The Doctrine of *Res Judicata* Is Inapplicable to the Facts at Bar

The salutary doctrine of repose does not apply to a cause of action based on events occurring after another action has been determined.

The District Court Erroneously Granted Summary Judgment

The record before the District Court was insufficient to permit any determination of the scope and coverage of the Supreme Court proceedings.

The Erroneous Finding of *Res Judicata* Prejudices MHG's Ability to Protect its Property

To affirm the determination of *res judicata* by the District Court not only deprives MHG of a federal remedy but can be construed as placing this Court's stamp of approbation on a clear violation of state law and may preclude any state remedy.

ARGUMENT

POINT I

The doctrine of *res judicata* is inapplicable to the facts at bar.

MHG alleges and has submitted affidavits demonstrating a denial by agencies and officials of the City of equal protection of the law resulting in a deprivation of property without just compensation or due process of law. Such denial of equal protection gives rise to a federal claim against political subdivisions and their administrative agencies. *Henry* v. *Greenville Airport Commission,* 279 F.2d 751 (4th Cir., 1960). See also *Abrams* v. *Bronstein,* 33 N.Y. 2d 488, 354 N.Y.S. 2d 926, 310 NE 2d 528 (1974). The fact that the District Court decided this action on the basis of a claim of *res judicata,* an affirmative defense [See Rule 8(c) *Fed. R. Civ. P.*], indicates that the District Court determined that it had jurisdiction of MHG's claims.

The claims presented to the District Court were not presented to the New York Supreme Court or any other court prior to the institution of this action, because the acts complained of occurred only subsequent to determination of MHG's appeal to the Appellate Division (A165). Moreover, MHG was lulled into believing that such acts would not occur. For example, relocation benefits were denied upon the advice of the Corporation Counsel only after his representatives had promised in open court that they would assist MHG in obtaining such relocation benefits and after officials of the Department of Relocation had assured MHG that such benefits would be granted (A15). The United States Supreme Court definitively held, in *Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322, 75 S. Ct. 865, 99 L.Ed. 1122 (1955), that a prior judgment does not bar a similar action based on subsequently

occurring acts even though such acts were substantially the same as those involved in the prior action.

Thus, the doctrine of *res judicata* cannot apply because the claim presented to the District Court had not previously been presented to any other court. Indeed, it could not have been presented for the acts underlying the claim had not yet occurred. It was to clarify this point that MHG amended its complaint.

Nor does the doctrine of collateral estoppel apply, even with respect to the issue of the City's need for the premises. Although MHG attempted to raise that issue in the State court proceedings, it was never considered on the merits by any State court. Since the State courts refused to go behind a stipulation of the parties despite changed circumstances, MHG was explicitly denied the opportunity to question the City's need for the premises. When there is such an explicit denial, the doctrine of collateral estoppel is not applicable for there was no actual determination of the issue. See *James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F.2d 451, 459 (5th Cir., 1971), *cert. den.* 404 U.S. 940 (1972).

The words of Judge Brown in *Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corp.*, 421 F.2d 1313 (5th Cir., 1970), *cert. den.* 400 U.S. 991 (1971) are particularly pertinent here. Speaking of the broad use of the doctrines of *res judicata* and collateral estoppel, he said:

> "The defendants pressed these doctrines on the District Court as though they were to be used as clubs to accomplish the policy embedded in them: the prevention of a repetitive litigation. The doctrines must be used, however, not as clubs but as fine instruments that protect the litigant's right to a hearing as well as his adversary and the courts from repetitive litigation. In addition, it must be remembered that the use of these doctrines can cloak a party in perpetual

> immunity and thus possibly protect conduct lasting long past the prior judgment—conduct that the law may grow to abhor." *Ibid.* at 1316.

Such a caution is peculiarly appropriate here where the City and PDC have threatened to dispose of MHG's property out of hand. The inappropriate application of the doctrine of *res judicata* to this action may thus permit a conversion of MHG's property by the City and PDC and deprive MHG of any remedy—state or federal—to redress such wrong, even though it comes months after a final judgment in the action asserted as a bar.

It is significant to note that none of the authorities cited by the City and PDC in the District Court in support of their assertions of *res judicata* remotely bear on the facts in the case at bar. *Thistlethwaite* v. *The City of New York,* 497 F.2d 339 (2d Cir., 1974), *cert. den.* 419 U.S. 1093 (1975), involved a suit for declaration of constitutional invalidity of local park rule against pamphleteering. In *Hutcherson* v. *Lehtin,* 485 F.2d 567 (9th Cir., 1973), plaintiff tenants sought a judgment declaring California's unlawful detainer statutes unconstitutional. In *Lombard* v. *Board of Education,* 502 F.2d 631 (2d Cir., 1974), *cert. den.* 420 U.S. 976 (1975), a teacher in the New York City school system challenged the termination of his employment; in *American Surety Company* v. *Baldwin,* 287 U.S. 156, 53 S. Ct. 98, 77 L.Ed. 231 (1932), plaintiff alleged that judgment had been entered against it without proper notice or an opportunity to be heard; and in *Daniels* v. *Thomas,* 225 F.2d 795 (10th Cir., 1955), *cert. den.* 350 U.S. 932 (1956), plaintiffs sought a declaration that a judgment was void for lack of due process. None of these cases concern condemnation or events occurring after the judgment asserted as *res judicata.*

On the other hand, in *Joiner* v. *City of Dallas,* 380 F. Supp. 754 (N.D. Texas, 1974), *aff'd* 419 U.S. 1042, 95 S. Ct. 614, 42 L.Ed. 2d 637 (1975), an action commenced during

the pendency of state condemnation proceedings, the Three Judge District Court considered the case on the merits, noting that "the federal judiciary has traditionally entertained litigation on the propriety of condemnation despite simultaneous litigation in the state courts (citations omitted)" *Ibid.* at 760.

Finally, the doctrine of *res judicata* should never be applied inflexibly to perpetuate manifest injustice. The United States Supreme Court, in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S. Ct. 461, 11 L.Ed. 2d 440 (1964), has held that *res judicata* is not always to be accorded a state court determination of federal constitutional issues. In *England,* although technically applicable because the federal issues had not been reserved in the State courts, the Court declined to enforce the doctrine and reversed the District Court's dismissal of a subsequent action. See also, e.g., *State ex rel. White Pine Sash Co.* v. *Superior Court,* 145 Wash. 576, 261 P. 110 (Wash. S. Ct., 1927) where the doctrine was denied application in a condemnation proceeding. The case at bar is an appropriate one in which to decline enforcement of the inflexible technical rules and regulations urged by the City and PDC.

POINT II

Whether or not *res judicata* applies is an issue of fact to be determined at trial.

Even if the doctrine of *res judicata* is to be considered as applicable to this action, an essential inquiry by the District Court had to be the scope and coverage of the judgment urged as a bar to the action. This inquiry involved a genuine issue of material fact requiring denial of the motion to dismiss. Indeed, the essential preliminary step of receipt into evidence of the record in the state action was not taken. On this basis alone, the dis-

missal must be reversed. *Guam Investment Co.* v. *Central Building, Inc.*, 288 F.2d 19 (9th Cir., 1961).

In the case at bar, as in *Guam Investment*, the defendants below asserted the bar of a judgment without offering the record. Here, the City has submitted only the judgment, an order affirming the judgment and briefs on appeal. As in *Guam Investment*, the amended complaint and affidavits make allegations concerning matters which occurred subsequent to the judgment.

> "It appears to us that before an action can be summarily dismissed on the ground of res judicata the ends of justice require as a minimum that the defense of res judicata appear [sic] from the face of the complaint or that the record of the prior case be received in evidence." *Guam Investment Co.* v. *Central Building, Inc., supra,* at 24.

Since it is well established that credibility issues cannot be determined on a motion for summary judgment, it is clear that the scope of the New York Supreme Court judgment considered with the allegations concerning the conduct of the City and PDC after final decision by the Appellate Division is a question for further development and decision after trial.

POINT III

The erroneous finding of *res judicata* prejudices MHG's ability to protect its property.

It must be recalled that the Supreme Court has made no final determination as to the ownership of the amusement rides and other property or as to their value. No decree has been entered on Justice Castaldi's November 19, 1975 decision, so the inevitable appellate process has not begun (A68-69). Indeed, as to that portion of the premises which had been privately owned, no hearings as to ownership

have even been held (A14). Yet, the City's Department of Real Estate, at the instance of PDC, has threatened to treat millions of dollars of amusement rides as abandoned —and to destroy them—all in violation of the law of New York. See, e.g. *Boardwalk Stores Corporation* v. *Moses*, 269 A.D. 506, 56 N.Y.S. 2d 303 (2d Dept., 1945), *amended* 269 A.D. 911, 56 N.Y.S. 2d 303 (2d Dept., 1945) holding that although a City may have a right to possession of the condemned realty, it commits a trespass or a conversion if it sells or destroys the property of the condemnee located thereon.

Clearly then, this Court should not permit the erroneous finding of *res judicata* to stand and to cloak the City and PDC "in perpetual immunity" protecting it from the consequences of abhorrent conduct. *Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corp., supra,* 421 F.2d at 1316.

With respect to this issue, there has obviously been no determination in any court. It would be unfair and prejudicial to MHG for any doubt to be created by the decision in this case that such a determination had, in fact, been made. Thus, if this Court is disposed to affirm the dismissal below, elementary fairness requires that the basis for the decision should be made crystal clear. While it is conceivable, although we submit otherwise, that the amended complaint did not state a federal claim or demanded relief that is too broad, the dismissal of the amended complaint cannot and should not be affirmed on a ground that suggests that a remedy for any destruction of MHG's property is precluded by *res judicata.*

CONCLUSION

For the foregoing reasons, the judgment dismissing the amended complaint should be reversed and the case remanded to the District Court.

Respectfully submitted,

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HOWARD M. SQUADRON
NEAL M. GOLDMAN

The City of New York

DEPARTMENT OF REAL ESTATE

2 LAFAYETTE STREET, NEW YORK, N. Y. 10007

IRA DUCHAN, *Commissioner*

In reply refer to:
R. Fratangelo
Tel. No. 566-1714

M.H.G. Enterprises Inc.
Harold Glantz, Pres.
28-50 Linden Place
Flushing, N. Y.

Re: Block 4334, Lot Pt. 10
28-50 Linden Place
Borough of Queens
Adventurers Amusement Park

Gentlemen:

On April 29, 1976 (date), the Real Estate Department took legal possession of the above premises.

You are therefore, directed to remove all personal property from said premises within thirty (30) days. Upon your failure to do so, the City of New York will deem such property abandoned, and dispose of it as it sees fit. All expenses to be charged to the owner of such property.

Very truly yours,

Milton C. Master

Milton C. Master, Director
Bureau of Property Management

CERTIFIED MAIL.
RETURN RECEIPT REQUESTED

United States Court of Appeals
For the Second Circuit

MHG Enterprises, Inc., Jay Playland Corp. I.G. Amusement Corp., G & G Ride Corp. J.M.P. Enterprises Inc. Ron Lombardi & Glen Perry d/b/a Eastern Amusement, The Great Adventure Anusemtn Park Inc. et al.

Plaintiffs-Appellants

against

New York City Public Development Corporation, The City of New York and The Sherriff of the City of New York

Defendants-Appellees

On appeal from the United States District Court for the Eastern District of New York

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for Squadron Ellenoff & Plesent being duly sworn,

deposes and says that he is over the age of 21 years and resides at Levittown, New York

That on the 23rd. day of June , 1976

he served the annexed Appendix & Plaintiffs-Appellants Brief upon

W. Bernard Richland
Corporation Counsel of the City of New York
Attorney for Defendants-Appellees
Municipal Building
New York, New York

in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 22 23rd. day of June, 1976

Raymond J. Braddick

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4609705
Qualified in Delaware County
Commission Expires March 30, 1977

Services of three (3) copies of

the within is

hereby admitted this day

of , 197.

Attorney for